

Before

James C. Peck, Jr.
Arbitrator

In the Matter of Arbitration Between:

**FRATERNAL ORDER OF POLICE,
LODGE NO. 5**

V.

**AAA Case No. 14 390 00795 11
P/O Michael A. Torres, Jr. (Terminated)**

THE CITY OF PHILADELPHIA

**Hearing Dates: February 10, 2012
Decision Date: July 5, 2012**

Appearances:

For the Union - Marc L. Gelman, Esq., Jennings & Sigmond, P.C.

For the City of Philadelphia - Sharon Glogowski, Esq., City of Philadelphia, Law Department

Procedural Background

This arbitration was conducted pursuant to a collective bargaining agreement between the City of Philadelphia, Pennsylvania and Fraternal Order of Police, Lodge, No. 5. Lodge No. 5 is the recognized exclusive collective bargaining representative for a unit of police officers employed by the City of Philadelphia.

Currently, the parties are operating under a collective bargaining agreement which has a term of July 1, 2009 through June 30, 2014. This contract contains, among other things, a Grievance-Arbitration provision (Article XXI) providing for final and binding arbitration under the auspices of the American Arbitration Association. Additionally, the contract contains at Article XXII, Section U, a residency requirement mandating that certain employees maintain a *bona fide* residence within the City of Philadelphia.

The instant matter arises from a grievance filed by the Union on behalf of terminated Police Officer Michael A. Torres, Jr. The grievance alleges various unspecified violations of the collective bargaining agreement, and arises out a Notice of Dismissal, which was issued by the City of Philadelphia to Officer Torres on or about March 2, 2011.

This grievance was denied by the City, and when the issues of this dispute could not be resolved under the terms of the contractual grievance-arbitration procedure, the underlying grievance was referred to the American Arbitration Association for selection of a neutral arbitrator. Subsequently, by letter dated June 15, 2011, the undersigned was appointed Arbitrator in this matter.

Pursuant to a Notice of Hearing which issued on November 3, 2011, a hearing was conducted on February 10, 2012, at the offices of the American Arbitration Association, 230 South Broad Street, Philadelphia, Pennsylvania. Both parties were represented by counsel, and at hearing were afforded the opportunity to examine and cross-examine witnesses and introduce relevant exhibits. The grievant, Police Officer

Torres, was present and participated fully in the proceeding. Both parties filed post-hearing briefs.

Issues

Did the City of Philadelphia violate the express terms of the collective bargaining agreement by suspending, and later discharging, Officer Torres without just cause? If the City is found to have violated the terms of the collective bargaining agreement, what is the appropriate remedy?

Facts

Police Officer Michael A. Torres was employed by the Philadelphia Police Department beginning in February 2007, when he entered the Police Academy. At the time of his discharge on March 2, 2011, Torres was working as a patrol officer in the 22nd Police District, located at 17th Street and Montgomery Avenue in North Philadelphia.

On March 2, 2011, Officer Torres was issued a Statement of Charge Filed and Action Taken, which asserted that he had failed to maintain a *bona fide* residence within the City of Philadelphia or Commonwealth of Pennsylvania, consistent with the current collective bargaining agreement/civil service regulations.

Thereafter, an internal Hearing was conducted on April 8, 2011 before the Department's Police Deputy Commissioner for Organizational Support Services. At that Hearing the issue of Officer Torres's residency status was further explored. Thereafter, decision was made to terminate Torres's employment.

As noted above, the basis for Officer Torres's discharge was the City's belief that Torres violated the City's residency requirement. The issue before me is whether Officer

Torres was, in fact, a *bona fide* resident of the City of Philadelphia, or whether he actually resided outside the City at [REDACTED] Westville, New Jersey.

At the Arbitration Hearing conducted before me in this matter, the City presented as its initial witness Police Lieutenant Lorraine Dusak. Dusak testified that she has been a police lieutenant for 16 years with 15 years experience in Internal Affairs. Dusak testified that she primarily handles complaints against officers concerning misconduct or physical abuse, and that this was her first case involving the City's residency requirement.

According to Lieutenant Dusak, Patrolman Michael Torres first came to the attention of the Internal Affairs Division on or about April 29, 2010 when citizen D [REDACTED] L [REDACTED] filed a complaint with Internal Affairs, alleging that her estranged husband, Patrolman Torres, had engaged in numerous and various types of misconduct. L [REDACTED] claimed that Officer Torres, to whom she had been married for 3 or 4 months, had threatened to kill her, and had made threatening phone calls to her place of employment. L [REDACTED] further asserted that Torres had taken money, jewelry, and various electronic items from suspects whom he had stopped during the course of his police duties. L [REDACTED] additionally contended that Officer Torres had bragged about this misconduct, and had implicated several other police officers in similar misdeeds.

Complainant D [REDACTED] L [REDACTED] turned over to Internal Affairs investigators several items, including cameras, cell phones, a ring, and a knife which she claimed Officer Torres had illegally taken from suspects. L [REDACTED] asserted that she was fearful that Torres would kill her, as he allegedly had threatened to do.

Almost as an afterthought, L [REDACTED] remarked that Officer Torres was living in New Jersey with his current girlfriend, whom she identified as A [REDACTED] R [REDACTED] or A [REDACTED] M [REDACTED]. When asked by Internal Affairs where Torres resided, L [REDACTED] replied, "He

says he goes house to house. He lives with the girlfriend, but for court he uses [REDACTED]

[REDACTED]¹

Thus, the Internal Affairs investigation began. Concerning the alleged shaking down of suspects for cash or other electronic items, Internal Affairs officers interviewed Patrolman Torres, and his fellow officers, who all denied improperly taking cash or any other items from suspects. IAD also attempted, without success, to ascertain the ownership of the cell phone that L [REDACTED] had claimed she received from Officer Torres. Ultimately, Internal Affairs concluded that there was insufficient evidence that Torres, or any of the other named officers, had taken cash or electronic items from suspects, as alleged by L [REDACTED].

However, the investigation reached a different conclusion with regard to the issue of Torres's residency. During Torres's investigatory interview, conducted on September 8, 2010, Torres initially asserted that since January 1, 2010 he had lived at [REDACTED] [REDACTED] with his sister N [REDACTED] T [REDACTED], her fiancée, and with Torres's niece and nephew.

When pressed as to other prior addresses, Torres claimed that he had lived at [REDACTED] [REDACTED] from 2007 to the end of 2009, but also claimed that in the beginning of the summer in 2010 he had begun living, as he put it "...in Westville (New Jersey) at a summer residence with my new girlfriend."²

Upon further questioning, Torres admitted that the night before the investigatory interview he had slept at the house in Westville (New Jersey) at the "summer home" of his girlfriend, A [REDACTED] R [REDACTED]. He claimed that R [REDACTED] had a permanent address at [REDACTED] [REDACTED] Philadelphia.

¹ See IAD statement of D [REDACTED] L [REDACTED], admitted as part of City Exhibit 1.

² See IAD statement of Michael Torres, admitted into evidence as part of City Exhibit #1.

Torres was questioned as to where his six children attended school (Philadelphia), and whether he had filed a joint tax return with R [REDACTED] (no). The IAD investigators quizzed Torres as to the make and model of his automobiles, and the addresses at which the cars were registered and insured (Philadelphia).

Torres was asked, "When was the last night you slept in Philadelphia?" He replied, "A couple of months ago."³ Torres further admitted that on nights that he was scheduled to work, after he went off duty he would go to the property at [REDACTED] [REDACTED] Westville, New Jersey, remarking, "I go eventually. I go other places first."

Torres was further interrogated concerning his driver's license, Federal and State Income Tax returns, mortgage and lease payments, and credit card bills, all which indicated Philadelphia residency. Basically, with the exception of a cable television bill for the Westville, New Jersey address, which was listed in Torres's name, all of the documents were consistent with residency in Philadelphia.

As the interview concluded, Torres was reminded of his obligation to maintain a residence in Philadelphia as a condition of employment, and replied, "I was not planning on staying in Westville more than the summer and planned on being back at [REDACTED] [REDACTED] in September."⁴

Torres was advised that the issue of his residence had been assigned to the Internal Affairs Bureau, which would be checking to ensure that he abided by the residency requirements.

Several months after this initial investigatory interview with Patrolman Torres, IAD Lieutenant Dusak again received information that Torres was living in New Jersey. Since residency investigations were outside her area of expertise, Dusak sought

³ See IAD statement of Michael Torres, *supra*.

⁴ See IAD statement of Michael Torres, *supra*.

permission to commence a residency investigation, utilizing the services of the Investigative Support Services squad.

Lieutenant Mark Cacciatore testified credibly at hearing that he has been with IAD for almost 20 years, and that he manages a surveillance team that investigates residency issues. This unit is known as Investigative Support Services or ISS, and works within the Police Department's Internal Affairs Division. ISS investigates allegations of violations of the City's residency requirement, as set forth in the City Code. Lieutenant Cacciatore testified that the ISS unit works as a team, staking-out the homes of police officers suspected of violating the residency requirement, documenting their comings and goings, and following them to and from work, to ascertain if the suspected police officers, in fact, live in the City. The ISS unit detectives maintain extensive written logs, and also surreptitiously photographs the daily activities of police officers suspected of violating the residency requirement.

Lieutenant Cacciatore testified in detail about two investigations undertaken to determine whether Police Officer Torres maintained a *bona fide* residence within the City of Philadelphia. One of the first steps undertaken by the ISS unit was a check of motor vehicles registered to Officer Torres, and to his girlfriend, A [REDACTED] R [REDACTED]. This established that Torres owned a Kia Rio and also a Dodge Durango, and that R [REDACTED] owned a Nissan Altima.

An initial surveillance was conducted between July 8, 2010 and July 30, 2010, encompassing more than 20 days. In addition to the property at [REDACTED] in Westville, NJ; surveillance was conducted at [REDACTED] in Philadelphia, and at [REDACTED] Philadelphia, which were both claimed by Torres at various times to be his residence. Surveillance was also conducted at the 22nd Police District, to ascertain the times of Torres's arrivals and departures.

This initial investigation produced an investigative packet, captioned ISS Surveillance #10-1611, which established that during this surveillance period Officer

Torres was observed exclusively at the Westville, New Jersey address, where girlfriend A [REDACTED] R [REDACTED] resided, and at the Police District; but not at the [REDACTED] address in Philadelphia, which was Torres' home address in his personnel file.

Lieutenant Cacciatore also testified about a second surveillance of Torres which was conducted from December 24, 2010 through February 11, 2011, following the second complaint alleging that Torres was still living in New Jersey. This investigation encompassed all of the above-listed residences, and also Torres's comings and goings from the Police District.

This investigation concluded that on 21 occasions, Officer Torres was observed at the [REDACTED] address in Westville, New Jersey, while he was observed only three times at [REDACTED] his claimed residence in Philadelphia. The investigative file compiled by Lieutenant Cacciatore was introduced into evidence as City Exhibit #1, and is approximately one-inch thick, replete with surveillance photos and reports, and other evidence collected during the course of the ISS investigation.

At the Arbitration Hearing before me, Deputy Police Commissioner John Gaittens testified as to the IAD investigation of Torres, and about the Residency Hearing that was conducted on or about April 8, 2011. According to Gaittens, Torres basically admitted that he had stayed at his sister's house in Philadelphia for only a few weeks, and admitted to living for about seven months with his girlfriend, in New Jersey.

Gaittens recalled that Torres presented a lease dated March 2011, for an apartment in Philadelphia, and a letter from a realtor with the Keller-Williams Agency which purported to show that Torres had been searching for a rental apartment in Philadelphia for some months prior to that date. Gaittens, however, found this evidence unpersuasive, and concluded that the IAD investigation and Torres's own admissions established that Torres had failed to establish that Torres had maintained a *bona fide* Philadelphia residence, as required by the City Code.

Philadelphia Police Commissioner Charles Ramsey also testified briefly during the hearing before me. Essentially, Ramsey asserted that he sustained the termination of Officer Torres because Torres had failed to comply with the residency provisions of the City Charter, for which the penalty is termination.

The Grievant herein, Officer Torres, testified in his own defense, and asserted that following his separation from his wife, D [REDACTED] L [REDACTED], he moved into his sister's house at [REDACTED] in Philadelphia, taking with him his clothes, uniforms, TV, Play Station, police gear and weights. The remainder of Torres's possession were left at the home he had shared with L [REDACTED], and ultimately she disposed of them. While living at his sister's house, Torres shared a small bedroom with his nephew, who was [REDACTED]

During this same time frame, Torres was dating A [REDACTED] M [REDACTED] aka A [REDACTED] R [REDACTED], who owned a home in Westville, New Jersey. Torres credibly testified that he did not pay the mortgage on the Westville house, nor did he pay any rent, but did pay the Comcast cable bill, since R [REDACTED] had credit problems which barred her from getting cable in her own name.

Torres asserts that he never moved his few remaining possessions to R [REDACTED]'s New Jersey home, and that for his numerous overnight visits he took only the clothing he needed for the next day. Torres claimed that he maintained a presence in Philadelphia, belonging to a gym near Welsh Road and Roosevelt Boulevard, and frequenting a shooting range near Holmesburg Prison. Torres further claimed that he registered his vehicles in Philadelphia, initially at the [REDACTED] home owned by his ex-wife; and later at the [REDACTED] home, owned by his sister.

According to Torres, around September 2010, which would be about the time that Torres was first confronted by IAD about his residency issues, he began looking for a Philadelphia apartment through M [REDACTED] W [REDACTED] a realtor with Keller Williams. Torres indicated that it was difficult for him to qualify for an apartment, noting, "My credit was

shot from the divorce, from going to child support court (sic). My paycheck, they take half out of my paycheck for child support.”⁵

Eventually, Torres found a landlord who accepted him despite his damaged credit, and at some unspecified date Torres and R█████ moved in together, to an apartment on ██████████, in the City. The relationship terminated shortly thereafter, with R█████ remaining in the apartment, and Torres returning to his sister’s home; where he was residing as of the date of the instant arbitration.⁶

Also testifying on Torres’s behalf was his sister, N█████ R█████ who asserted that Torres had moved in with her family at the ██████████ home, following his separation from his wife, D█████ L█████. R█████ claimed that Torres gave her a couple of hundred dollars a month, and shared a small bedroom with her son. During this time, between her brother’s separation from L█████ and Torres’s move to the ██████████ ██████████ apartment, Torres “frequently” stayed in New Jersey at the home of A█████ R█████, but kept his few possessions at the ██████████ location. When Torres’ relationship with R█████ soured in January 2012, Torres moved back in with his sister at the ██████████ home. (This, of course, was after his termination from the Police Department.)

Analysis and Discussion

As stated in the introduction of this Award, the issue to be decided herein is whether the City violated the terms of the collective bargaining agreement by discharging Officer Torres. In order to make this determination, I must first determine whether Officer Torres violated Philadelphia City Code 20-101 by failing to maintain a residence within the City.

⁵ See Official Transcript, Page 102.

⁶ Apparently, R█████ lost her house in Westville, New Jersey, due to a foreclosure.

The facts in this case are not really in dispute. From sometime in 2010 when Torres separated from his then-wife, D [REDACTED] L [REDACTED], until some unspecified date in early 2012 when Torres moved into the apartment on [REDACTED] with A [REDACTED] R [REDACTED], Torres spent many, if not most nights at R [REDACTED]'s home in Westville, New Jersey.

Torres knew, or should have known, of his obligation to maintain a residence in the City of Philadelphia. If there was any doubt on his part, it surely would have been erased upon his IAD interview on September 8, 2010 when Torres was advised that IAD had been investigating him and would be following-up on the issue that had arisen concerning his residency.

Evidently, however, the evidence was not sufficient as of September 8, 2010 for the City to conclude that Torres was in violation of the residency requirement, or else the City would have summarily terminated Torres at that time, based on the results of the ISS surveillance which had been conducted between July 8 and July 30, 2010.

Following the IAD interview on September 8, 2010, Torres appears to have made a good faith effort to find a living arrangement which would be satisfactory to the City. He employed the services of realtor M [REDACTED] W [REDACTED], and commenced a search for a landlord who would accept him as a tenant; despite his damaged credit and his limited ability to pay. Not only was this apartment search prompted by the warning issued by IAD, Torres was also aware of the fact that his then-girlfriend A [REDACTED] R [REDACTED] was in the process of losing her Westville, New Jersey home to foreclosure. Torres simply had no choice but to find another place to live, and the place that he ultimately found was the [REDACTED] apartment, which appears to meet the requirements of the City Code.

Unfortunately for Torres, his apartment search coincided with the timing of IAD's second surveillance, which was conducted from December 24, 2010 through February 11, 2011, and which established that Torres was still frequenting the Westville, New Jersey home of A [REDACTED] R [REDACTED] and was spending most nights there.

The City has offered no evidence to counter the claim that Torres maintained his meager possessions at his sister's house at [REDACTED] nor does the City dispute Torres's assertion that he frequented a gym and shooting range in Philadelphia in his spare time.

It is unfortunate that the City and the FOP have been unable to reach agreement as to what constitutes a *bona fide* residence, or for that matter what standard of proof should be used in deciding whether the residency standard has been met. In the absence of any agreement of the parties, it is left to Arbitrators to make such determinations.

Regarding the standard of proof, the City has the burden of proof in this matter, since this matter involves discharge, which is the "capital punishment" of the workplace. The burden of proof in Philadelphia residency cases has previously been determined by Arbitrators Thomas G. McConnell, Jr. and Alan Symonette as being to a "*beyond a reasonable doubt*" standard. *FOP, Lodge 5 and the City of Philadelphia (Clarke)*, AAA Case No. 14 390 1611 06; *FOP, Lodge 5 and the City of Philadelphia (Kurowski)*, AAA Case No. 14 390 1372 98.

As Arbitrator Symonette has noted, the residency requirement is one of the few areas where an individual can be summarily terminated. In a prior case involving the residency requirement, I have utilized this same standard, and see no reason why it should not be employed in the instant matter. Accordingly, it is my intention to apply the "*beyond a reasonable doubt*" standard in the instant case.

Black's Law Dictionary 161 (6th ed. 1990) defines "beyond a reasonable doubt" as "...fully satisfied, entirely convinced, satisfied to a moral certainty. This phrase is the equivalent of the words *clear, precise, and indubitable*."

I have carefully reviewed the briefs of the Parties with regard to exactly which factors should be examined to determine "residency" or "domicile", and have also reviewed prior arbitration awards dealing with this vexing issue. Among the factors which I consider in determining residency are:

1. The location where the employee engages in the majority of his social activities,
2. The location where the employee spends the majority of his time,
3. The location where the employee's children attend school,
4. Whether the employee rents a home in the City and owns a home outside the City,
5. The address where the employee's vehicle is registered.

Applying these factors in the instant case, there is no evidence as to Officer Torres's social activities, other than Torres's own testimony that he works out at a gym, and shoots at a gun range, both in the City.

With regard to where the Grievant spends his time, it is undisputed that Torres spends at least 8 hours per day in the City, performing his duties as a police officer. The surveillance logs and photos, however, show that Officer Torres also spent significant time, including most nights, at the Westfield, New Jersey home owned by his then girlfriend, A [REDACTED] R [REDACTED]. However, it is not unreasonable to conclude that this was a temporary arrangement, since Torres knew that R [REDACTED] was about to lose her New Jersey home to foreclosure, and that he would have to make other living arrangements.

There was no evidence produced by the ISS investigation as to where Torres's children attend school. However, Torres testified that they attend school in the City.

With regard to the fourth factor dealing with property ownership, there is no evidence that Torres owns property anywhere. Torres did, however, have an informal

rent arrangement with his sister, and later a lease on the apartment on [REDACTED] both in the City.

Finally, with regard to the registrations of vehicles owned, the evidence is clear that Torres owned several motor vehicles, and that all of those vehicles were titled in his name, and registered at addresses within the City. Further, Torres maintains a Pennsylvania driver's license, which lists an address in the City.

This case is unlike other residency cases where employees have gone to great lengths to conceal the fact that they were violating the residency requirement. Here, Officer Torres was forthright about his chaotic living arrangements and made no attempt to create a false paper trail, or to otherwise structure his assets to create an appearance of compliance with the City Code requirements. The totality of the evidence presents a mixed and unclear picture as to whether Officer Torres met the requirement of establishing a *bona fide* residence within the City. However it is the City's burden to show that Torres failed to comply with the City Code.

This is a highly unusual, fact-driven case. Exactly how much latitude should be granted to a police officer who has been forced to leave his marital home because of the dissolution of his marriage; and who has been further handicapped by being deprived of half of his income because of child support payments? Is it reasonable to expect a police officer in such circumstances to depend upon the generosity and kindness of family members, even if his presence in their home will constitute a burden to them? Exactly how many nights spent out of the City is too many? Was there an intent on the part of the Officer to violate the residency requirements, or merely a difficulty in fully complying with them?

While there is evidence indicating that Officer Torres resided outside the City and violated the City Code by failing to maintain a *bona fide* residence within the City, there is also significant evidence to the contrary which simply cannot be discounted. Having carefully weighed all of the evidence, I am not "entirely convinced" or "fully satisfied"

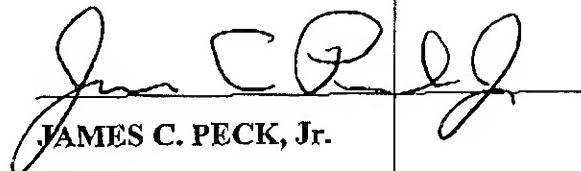
that the City has met the high burden of proof necessary to sustain the discharge in this matter. I am, therefore, refusing to uphold the suspension and discharge of Officer Torres.

AWARD

Based on the evidence, and the discussion as set forth above, the undersigned makes the following award:

The grievance alleging that the Police Department violated the collective bargaining agreement by suspending and discharging Police Officer Michael A. Torres is hereby SUSTAINED. The City is directed to offer reinstatement to Officer Torres to his previous position, with full backpay, and to make him whole for any loss that he has incurred as a result of his termination.

I shall retain jurisdiction over the remedy portion of this matter, in the event that there are any unresolved issues with regard to the remedy.



JAMES C. PECK, Jr.

Arbitrator

Media, Pennsylvania,

July 5, 2012